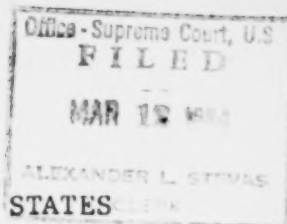


83 - 1519

Case No.

In The

SUPREME COURT OF THE UNITED



STATES

October Term, 1983

STATE OF FLORIDA,

Petitioner,

v.

RAYMOND LEE DRAKE,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE FLORIDA SUPREME COURT
AND APPENDIX

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QUESTIONS PRESENTED

- I. Whether the decision of the lower court impermissibly and overbroadly extends the custody definition of Miranda v. Arizona, 384 U.S. 463 (1966), beyond that recognized by this Honorable Court in Oregon v. Mathiason, 429 U.S. 492 (1977), and its progeny.
- II. Whether the lower court erred by reversing the trial court in Drake, based on an application Miranda v. Arizona, 384 U.S. 463 (Fla. 1966), by way of Edwards v. Arizona, 451 U.S. 457 (1981); where Edwards has been held by this Honorable Court to be clearly not applicable retroactively.

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TO THE FLORIDA SUPREME COURT

OPINIONS BELOW

The opinion of the Florida Supreme Court, which is under challenge herein, has not been reported, but appears as appendix A-1 -- A-16. The Order of the Florida Supreme Court denying motion for rehearing is not reported, but appears in appendix as A-17.

JURISDICTIONAL STATEMENT

The opinion of the Florida Supreme Court was rendered on October 27, 1983. A motion for rehearing was timely filed and denied by that court on January 11, 1984. This Court's jurisdiction is invoked pursuant to §1257(3), Title 28, United States Code and Rule 17 of the United States Supreme Court Rules.

CONSTITUTIONAL AND STATUTORY
PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

AMENDMENT [V.]

Capital crimes; double jeopardy; self-incrimination; due process; just compensation for property

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Raymond Lee Drake was originally charged with the first degree murder of Odette Reader, which occurred in November of 1977. He was sentenced to death, but on direct appeal to the Florida Supreme Court, the conviction was reversed. This was reported as Drake v. State, 400 So.2d 1217 (Fla. 1981), but is not the subject of this petition.

Raymond Lee Drake was retried in April of 1982, and again found guilty of

the murder and sentenced to death. The Supreme Court of Florida on direct appeal reversed the second conviction by its opinion rendered October 27, 1983. This opinion is included herein as appendix A-1 through A-16.

The State of Florida filed a Motion for rehearing which was denied by the Supreme Court of Florida on January 11, 1984. This is included as appendix A-17 herein.

The opinion of October 27, 1983, which is challenged herein, relied for reversal upon the case of Miranda v. Arizona, 384 U.S. 436 (1966) by way of Edwards v. Arizona, 451 U.S. 457 (1951).

The essential facts leading into the question placed before this Honorable Court are as follows: The decomposed body of Odette Reader was discovered

approximately six weeks after she was last seen leaving a bar with Raymond Lee Drake. The police were able to identify the body, and through further investigation ascertain that she left a bar under suspicious circumstances with an individual they were later able to identify as Raymond Lee Drake. Officers Pandakos and Coleman found where Drake was working and visited him at his work site. They told him that they were investigating the murder of Reader and that he was a suspect. They asked him to go to the police station with them for further interrogation, and he agreed.

Upon arriving at the police station, Drake was cooperative, but in statements to the police officers, claimed that he did not know Reader and had not been to that particular bar. When he was

confronted with statements from various witnesses having to do with the fact that he was the individual last seen with Ms. Reeder, and the fact that the friends expected her to return momentarily, since she had left her personal belongings on the bar, Drake refused to speak further and requested an attorney. The police officers tried, in the presence of Drake, to telephone his attorney, but were unable to get through to him.

Drake, at this time, refused to speak further, but did agree to record what he had previously said. The later tape represents further denials; however, there is one portion that was presented to the jury, because of Drake's pause when answering a question regarding a criminal always leaving something at the crime site.

While this was taking place, one of

the police officers contacted Drake's parole officer to advise him of a possible parole violation.

After giving the tape recorded statement, Drake agreed to allow the police officers to search his home and his automobile. This was done with the police officers being accompanied by Drake. Only after the entire interrogation, and tape recording, and search, did the parole officer enter the scene and place a ten day hold on Mr. Drake for violation of his probation. The violation was founded on his having smoked marijuana, and not on the substantive charge of murder which he was not arrested upon until several days later.

The factual statement above is based upon the statement of facts accepted by the Florida Supreme Court and its opinion

of October 27, 1983 included herein as appendix A-1 through A-16, and on the testimony of Detective Pandakos which is included herein as appendix A-18 -- A-51

REASONS FOR GRANTING THE WRIT

The instant case presents this Court with an opportunity to reassert its pronouncements in State v. Mathiason, 429 U.S. 492 (1977) with a vigor that will discourage state courts from overbroadly applying the doctrines in Miranda v. Arizona, 384 U.S. 436 (1966). The Petitioner submits that such a statement must be made by this Honorable Court, lest the boundaries and threshold requirements regarding Miranda be gradually eroded, so as to become meaningless. The Petitioner believes that this is particularly important in the case sub judice where the Florida Supreme Court has misapplied Miranda in a capital

case.

There is no need to scrutinize the specific rights accorded a defendant pursuant to Miranda v. Arizona, 384 U.S. 436 (1966), except to state that they apply only to custodial situations. After this court's opinion in Miranda, there were a multitude of cases presented as Appellants and Petitioners clamored to determine all of the myriad aspects concerning custody, semi-custody and non-custody.

One landmark case that is widely relied upon by prosecutors as well as the defense bar is the case of State v. Mathiason, 429 U.S. 492 (1977). This case has been especially important since essentially it has restated that it was, and always had been, this Honorable Court's intention that Miranda only apply to custodial situations. In Mathiason, this Honorable

Court held that a "coercive environment" does not change a known custody situation into one of custody where Miranda would apply. This Honorable Court at 429 U.S. 493 states:

"We think that court has read Miranda too broadly, and we therefore reverse its judgment.

(in pertinent part emphasis added)

(3) Such a noncustodial situation is not converted to one in which Miranda applies simply because a reviewing court concludes that, even in the absence of any formal arrest or restraint on freedom of movement, the questioning took place in a "coercive environment." Any interview of one suspected of a crime by a police officer will have coercive aspects to it, simply by virtue of the fact that the police officer is part of a law enforcement system which may ultimately cause the suspect to be charged with a crime. But police officers are not required to administer Miranda warnings to everyone whom they question. Nor is the requirement of warnings to be imposed simply because the questioning takes place in the station house, or

because the questioned person is one whom the police suspect. Miranda warnings are required only where there has been such a restriction on a person's freedom as to render him "in custody." It was that sort of coercive environment to which Miranda by its terms was made applicable, and to which it is limited.

The officer's false statement about having discovered Mathiason's fingerprints at the scene was found by the Supreme Court of Oregon to be another circumstance contributing to the coercive environment which makes the Miranda rationale applicable. Whatever relevance this fact (429 U.S. 496) may have to other issues in the case, it has nothing to do with whether respondent was in custody for purposes of the Miranda rule.

429 U.S. 496

(in pertinent part emphasis added)

In the later holding of this Honorable Court in the case of Edwards v. Arizona, 451 U.S. 477 (1981), this Honorable Court held that the criminal defendant

must be advised by the police that he has a right to consult with an attorney before submitting to a custodial questioning, and that if the defendant invoked his right to counsel, interrogation ceases until the defendant has the opportunity to consult with counsel. This Honorable Court goes on in Edwards to set out guidelines to govern situations where an individual in custody has requested an attorney and later been further interrogated by the police officers. Edwards did not change this Honorable Court's holding in Miranda nor recede one iota from the court's position in Mathiason. Edwards did no more than define a narrow area within the Miranda arena. The Petitioner bases this conclusion not only on an examination of the case, but by reading the concurring opinion in Edwards that appeared to have

joined the majority only because no new or radically different rule was being set down

The key question of custody being the threshold requirement for the application of Miranda either through Edwards or otherwise was not changed by Edwards and this cannot be seen any clearer than this Honorable Court's recent decision in the case of California v. Beheler, __ U.S. __, (1983), S.Ct. Case No. 82-1666, reported at 33 Cr. L. 4108, July 6, 1983. In that case, which the petitioner will quote from in a following section of this petition, the court clearly holds that Miranda applies to custodial interrogation where the defendant has been deprived of his freedom of action in any significant way. The court goes on in determining what "any significant way" constitutes by referring

to a "formal arrest or restraint of freedom of movement" of the degree associated with formal arrest. In that case, while the dissent disagrees with the court intervening by summarily reversing the California court, it appears that the dissenting opinion agrees that the term "of the degree associated with formal arrest" is operative.

The custody test that triggers the application of Miranda to a specific defendant can be analogized or likened to an electronic switch; that is to say, it has two discreet positions, on and off. If the defendant was in custody, then the switch is in the "on" position, and Miranda applies. If the defendant was not in custody, then the switch is in the "off" position and the Miranda does not apply. There is no middle ground analogous to an

electronic switch that attenuates by degrees.

If one is not in custody, the court must rule that Miranda does not apply. They may be offended by other conduct of the police officers, but it does not go toward the resolution of the Miranda custody question, and therefore is not only irrelevant, but it does disservice to the decisions of this Honorable Court that have attempted to clarify this matter.

The Florida Supreme Court in distinguishing the Drake case from the holding of this court in Mathiason apparently relies on the fact that Detective Pandakos did not abide by his agreement when he tape recorded the Appellant's previous statement, and attempted to induce Drake to go further. While this might offend the court, it has no application in the

resolution of the custody question for Miranda purposes. (It is important to note that in Mathiason, a police officer tricked the defendant in regard to a confession, but this Honorable Court did not find that relevant as to the question of custody.)

The Florida Supreme Court in their opinion also refers to the fact that the police officers subsequently notified the defendant's parole officer and he was arrested the same day on a parole violation for a different offense. It is imperative to recognize that Drake was arrested subsequent to the interrogation. Anything that occurred subsequent has no bearing on the custody question as it applies to Miranda. Other than these facts, there were no grounds that could significantly distinguish Drake from the Mathiason case,

and the later case of Beheler supra reiterates the fact that for custody, there must either be a formal arrest or a restraint of freedom equal to that level of a formal arrest. Sub judice, there was none.

The Florida Supreme Court in all respect to that Honorable Court, avoids the holding in Mathiason by paying lip service to it in the opinion in Drake and then circumventing it. To refer to it, and then to misapply its holding, is the same as disregarding the holding.

There can be no doubt as to the proper application of Miranda, within the narrow confines as set up by Mathiason, and concisely restated in Beheler as follows:

"Although the circumstances of each case must certainly influence a determination of whether a suspect is 'in custody' for

purposes of receiving the Miranda protection, the ultimate inquiry is simply whether there is a 'formal arrest or restraint of freedom of movement' of the degree associated with a formal arrest."

(in pertinent part, emphasis added)

In Drake, the defendant was not under formal arrest, nor was the restraint of a degree associated with formal arrest. The following are the facts that the Petitioner does not believe are disputed by either party. The specific testimony surrounding this may be found in the appendix at page A-18 through A-51

- (1) Drake was not under arrest when he went to the police station;
- (2) He was asked, not ordered, to accompany the police officers for interrogation;
- (3) The interrogation transpired in broad daylight;
- (4) He was not handcuffed or even touched by the police officers;

- (5) There was no intimidation of the defendant by either words or deeds, and questioning was cordial;
- (6) Drake was free to go all during the interrogation. (While it is true that he was not advised that he was free to go, the question never arose. The police officer did, however, testify that had he asked to leave, he would have been allowed to do so.
- (7) He was not arrested on the day of the interrogation for the murder which is the subject of this petition. (While it may be true that he was arrested subsequent to the interrogation for a violation of parole on a different matter that has no bearing on the Miranda question as to custody at the time of interrogation.)

The Florida Supreme Court does not follow this Court's holding in Mathiason by only partially recognizing the holding in that case (avoiding the concept of formal arrest or restraint rising to the level of formal arrest), but then goes on to avoid the implication of that holding

by stating that "a reasonable person would have believed that his freedom of action was restricted in a significant way." There is nothing in the record, however, to show that Drake was restricted in any significant way, if the facts in Mathiason, supra and Beheler, supra are demonstrative of this Honorable Court's sense of degree. If this treatment of the custody question by the Florida Supreme Court is not examined and corrected, then Mathiason, supra and Beheler, supra become meaningless as precedent in cases of this nature, and the Miranda Doctrine will again be without frontiers.

The only possible restraint that existed may have been Drake's later parole violation that day. It is critical, however, to note that this was for a different offense (not the murder charge) and

the subsequent custody taken of Drake was after the interrogation and tape recording were made. In fact, the record shows that after the interrogation, Drake allowed a voluntary search of his car and home. There was no custody of Drake until after that. This is critical, since during the interrogation, there was no custody or even a threat of custody hanging over the head of the defendant. At that time, neither he nor the police officers knew that he would be taken into custody after the taped statement and after the later voluntary search of his car and home.

A non-custody situation may have, arguendo, been converted into a custody situation by Drake's arrest for parole violation later that day, but the conversion occurred after the interrogation. Any statement that Drake made after the

subsequent custody ripening would properly have been stricken pursuant to Miranda, but sub judice, no statements were made subsequent to the custody occurring.

The Petitioner believes that even cursory examination of other federal cases where the federal judiciary has dealt with this type of situation show that the federal courts are less than quick to find that a custodial situation arises unless there is a formal arrest or egregious circumstances.

In the case of United States v. Giacolone, 508 F.Supp. 39 (S.D.N.Y. 1980), aff'd 659 F.2d 1063 (2d Cir.), cert. denied 454 U.S. 964 (1981) the court held that the defendant had not been in custody at the time that he was questioned by F.B.I. agents, even though the agents had

an arrest warrant for the defendant with them during the interrogation and they threatened the defendant with "a few nights in jail if he did not cooperate". Id. at 42. In reaching its conclusion, the court in Giacolone emphasized that the test for custodial interrogation is objective and not subjective and that intimidation by law enforcement officers does not itself work such a deprivation of freedom as to trigger the rights under Miranda. Id. at 42.

In the recent case of United States v. Wallraff, 705 F.2d 890 (8th Cir. 1983) the court stated that the Miranda safeguards offered protection in the cases of incommunicado interrogation of individuals in police dominated atmosphere resulting in self-incriminating statements without full warnings of constitutional rights.

Id. 992. In the Drake case, the interrogation was not incommunicado, it was not a police dominated atmosphere, no self-incriminating statements were made and there were full warnings of constitutional rights. In the case of Wallraff, the agent told the defendant that he was free to leave but that they were going to keep his bag and ticket folder. Also, it is important to note that in Wallraff, he was placed under arrest for the substantive crime after the interrogation. Apparently the court in that case felt that the arrest deprived him of his freedom but this did not occur until after the interrogation. Such is precisely on point with the case of Drake that is before this Honorable Court.

In the recent case of Minnesota v. Marshall, __ U.S. __ (1984), U.S.S.C. Case

No. 82-827, decided February 22, 1984, reported 34 Cr. L. 3057, this Honorable Court dealt with a situation whereby a parole officer interrogated an individual concerning previous inculpatory statements that he had made about an unsolved murder. While the probation officer may not be a police officer, he certainly has equal or greater power over a probationer than does a police officer. In that case, relying on Mathiason, supra and Beheler, supra, this Honorable Court found that a custodial situation did not exist to trigger the Miranda protections since there was "no formal arrest to restrain on freedom of movement of the degree associated with formal arrest". The court in that case discusses the "in custody" concept regarding federal habeas corpus and the extremely limited "in custody" concept for Miranda purposes.

The second question presented to this Honorable Court needs no extensive argument in light of this Court's recent holding in Solem v. Stumes, __ U.S. __ (1984), S.Ct. Case No. 81-2149, decided February 29, 1984. The opinion of the Supreme Court of Florida at appendix A-1 through A-16 clearly shows that the Appellant's argument below and the Court's reversal were based on application of Miranda supra through Edwards supra; that is to say the resumption of questioning of Drake after his request for an attorney. In November of 1977 when this occurred, the police officers in Drake did not have the benefit of the Edwards opinion and should not be penalized. This Honorable Court in the recent decision in Solem holds that Edwards will not be retroactive.

CONCLUSION

This Court should summarily reverse the Supreme Court of Florida; alternatively, the instant petition should be granted and the Court allow plenary review.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, ROBERT J. LANDRY, Counsel for
Respondent, and a member of the Bar of the
United States Supreme Court, hereby cer-
tify that on the ____ day of March, 1984,
I served three copies of the Petition for
Writ of Certiorari on William C. McLain,
Esquire, Assistant Public Defender, Chief,
Capital Appeals, Hall of Justice Building,
455 North Broadway, Bartow, Florida
33830-3798 by a duly addressed envelope
with postage prepaid.

ROBERT J. LANDRY
Assistant Attorney General

APPENDIX

SUPREME COURT OF FLORIDA

No. 62,185

RAYMOND LEE DRAKE, Appellant,

vs.

STATE OF FLORIDA, Appellee.

[October 27, 1983]

PER CURIAM.

Drake appeals his conviction and sentence of death for the first-degree premeditated murder of Odette Reeder following his second trial, the first conviction having been reversed in Drake v. State, 400 So.2d 1217 (Fla. 1981). We have jurisdiction pursuant to article V, section 3(b)(1), Florida Constitution, and again reverse.

Late in November of 1977, Drake met Reeder at the Crown Lounge in Clearwater. At about 11 p.m. Reeder left the bar with Drake, indicating to friends that she would return in a few minutes. Her friends never saw her alive again. Her badly decomposed and nearly nude body was discovered some six weeks later. A bra had been used to tie her hands behind her back. There were eight stab wounds in the lower chest and abdomen. The body's advanced state of decomposition made it impossible to rule out other possible causes of death.

When Drake, a parolee, became a suspect, Detective Pondakos and Sergeant Coleman approached him at his work site and requested that he go to the sheriff's office for questioning. Drake acquiesced and, upon his arrival, was taken to the

Crimes Against Persons Office. He was given Miranda¹ warnings and told that the sheriff's department was conducting a homicide investigation in which he was a suspect. Drake at first denied having been at the Crown Lounge and ever having seen Odette Reeder. When confronted with the statement that he had been seen leaving the lounge with Reeder, he said they left together for the purpose of smoking marijuana. At this point in the interrogation, Drake requested to see his attorney. Pondakos testified that he attempted unsuccessfully to make contact with the attorney, calling three times over a half-hour period. Pondakos and Coleman then continued to question Drake, but he refused to answer. The did persuade him,

¹ Miranda v. Arizona, 384 U.S. 436 (1966).

however, to agree to repeat on tape the matters of which he had already spoken. The inquiry was not so limited. During the questioning he was told that he had left something at the scene of the crime and that he should try to think of what the item might be. Drake paused briefly before answering that he could not have left anything since he had not been there. The state was allowed, over objection, to introduce the tape into evidence and to elicit testimony from Detective Pondakos that the pause showed Drake was thinking about what the overlooked item could be. The state also was allowed to introduce evidence that Drake was on parole at the time of the crime. The jury found Drake guilty as charged and recommended the death sentence, which the trial court imposed.

Drake argues that, according to Edwards v. Arizona, 451 U.S. 477 (1981), it was error to allow into evidence his taped statement. He explicitly requested that the interrogation cease and that he be allowed to consult with counsel. Under Edwards, further police-initiated interrogation could not be voluntary. The state argues that since Drake was not in custody pursuant to Oregon v. Mathiason, 429 U.S. 492 (1977), Edwards is inapplicable. Alternatively, the state argues that even if Drake was in custody, his statement was voluntary.

Our previous Drake opinion noted "a technical violation of the Miranda rule when Drake's statements to Detective Pondakos were admitted." 400 So.2d at 1220. Implicitly then, and explicitly now, we find Drake's situation distinguishable

from that in Mathiason. In that case, about twenty-five days after the burglary, the suspect responded to a message to call the police and went on his own to the state patrol office after working hours. He was told specifically that he was not under arrest. Within five minutes after arriving at the office, the defendant admitted to stealing property. He was advised of his Miranda rights, and the officer who had been questioning him took a taped confession. At the conclusion of the taping the defendant was told that he was not under arrest and was free to return to his job and family. His entire stay at the state patrol office lasted about half an hour.

Drake, on the other hand, was asked to leave his work in the middle of the day to accompany the officers to the sheriff's

office. Early during the course of the questioning he admitted to smoking marijuana with Reeder after having falsely denied being with her the night of her disappearance. Detective Pondakos subsequently notified Drake's parole officer of the narcotics violation and the homicide investigation and arrested Drake the same day without allowing him to leave. Drake apparently felt concern about the course the interrogation was taking, since he requested a lawyer and refused to answer additional questions. He remained silent until asked if he would answer on tape the same questions he had already answered. Detective Pondakos did not honor his agreement. Although the detective testified that Drake was probably free to leave at the time of the interrogation, there is nothing in the record to show that this

option was ever made clear to Drake. On the contrary, although Detective Pondakos testified that he did not want to use the parole violation "as a tool to keep him there," the fact that Drake had told Pondakos of the narcotics violation is a factor bearing on Drake's state of mind at the time he gave the statement.

The station-house setting of an interrogation does not automatically transform an otherwise noncustodial interrogation into a custodial interrogation.

Mathiason. Yet, an interrogation at a station house at the request of the police is inherently more coercive than an interrogation in another less suggestive setting, and it is a factor that should be considered in evaluating the totality of the circumstances of a given case. We find that, under the circumstances as they

existed at the time Drake submitted to the taped questioning, a reasonable person would have believed that his freedom of action was restricted in a significant way.² Especially persuasive is the fact that Drake's request to discontinue further interrogation without his attorney went unheeded. Such a turn of events would certainly give a reasonable person a sense of confinement.

The burden of proving the voluntariness of a statement is on the state.

State v. Chorpenning, 294 So.2d 54 (Fla. 2 DCA 1974). There is no factual basis to

² "In determining 'custody,' the majority of courts have utilized an objective test . . . whether, under the circumstances, a reasonable person would have believed he was in custody." Williams v. State, 403 So.2d 453, 455 (Fla. 1st DCA 1981)(citations omitted). We adopt this approach of the First District Court of Appeal.

support the state's argument that Drake's statement was voluntary. Once Drake had expressed his desire to have counsel, the only permissible additional inquiry would be to clarify an equivocal request. Nash v. Estelle, 597 F.2d 513 (5th Cir.), cert denied, 444 U.S. 981 (1979). Drake's request was unequivocal, and Edwards applies to prohibit further police-initiated interrogation before furnishing counsel. Instead, the police misled Drake into submitting to additional interrogation by the promise that no new ground would be covered. This arrangement was impermissible reinterrogation under Edwards, since Drake had clearly asserted his right to counsel. When the detective did not receive the hoped-for inculpatory response, he took the position, and testified before the jury, that Drake's pause meant that he was

thinking about what item was left at the scene of the crime. We find such a conclusion unwarranted and unduly suggestive. The taped interrogation was involuntary and its introduction was extremely prejudicial to the defendant's case in light of the fact that the prosecutor used the interrogation to argue before the jury that Drake's pause was an indication that Drake was lying. As we have said before, "[w]hen the error affects a constitutional right of the defendant, the reviewing court may not find it harmless 'if there is a reasonable possibility that the error may have contributed to the accused's conviction or if the error may not be found harmless beyond a reasonable doubt.'"

Palmes v. State, 397 So.2d 648, 654

(Fla.), cert. denied, 454 U.S. 882 (1981)

(quoting Nowlin v. State, 346 So.2d 1020,

1024 (Fla. 1977)). Such error may be treated as harmless where there is overwhelming evidence of guilt. Jones v. State, 332 So.2d 615, 619 (Fla. 1976).

The circumstantial evidence in the present case is less than overwhelming. We find therefore that another trial is the only way the defect can be cured.³

We hereby reverse Drake's first-degree murder conviction and remand to the circuit court for a new trial, thereby making unnecessary a ruling on Drake's other points on appeal.

We note that the trial court permitted the jury to hear that Drake was on parole, and that a witness answered in the affirmative as to his knowledge of the

³ We do recognize, however, that Drake's statements made prior to his request for an attorney are admissible.

nature of the crime for which Drake was on parole. The witness expressed his "concern [therefore] for the safety of the victim in this case." While relevant evidence should not be excluded merely because it points to the commission of a separate crime, Williams v. State, 143 So.2d 484 (Fla. 1962), it must be relevant to a material issue other than propensity or bad character. In our prior reversal of Drake's conviction, we found the evidence of previous crimes irrelevant to show either identity or motive. The state again argues motive and also that this evidence was relevant to show that Reeder, who knew Drake was a parolee, would not voluntarily accompany him in his car alone and therefore must have been kidnapped.⁴

⁴ The jury was given instructions on premeditated murder and felony murder, with kidnapping as the underlying felony.

We also fail to find this latter theory of relevance persuasive. That Reeder knew Drake was on parole has no logical or legal relevance as to whether she would get in the car, particularly since she had voluntarily accompanied him into the parking lot with knowledge of his parole status.

In the event Drake is reconvicted, we make two additional observations about the aggravating circumstances. Paragraph 4 of the trial court's findings of fact and conclusions of law reflects impermissible consideration of a nonstatutory aggravating factor:

4. The crime for which the Defendant is sentenced was without regard to human feeling by dumping in a rural area, disrobed, with the weather elements and animals to further act upon the body.

Only statutory aggravating factors may be

considered. Miller v. State, 373 So.2d 882 (Fla. 1979). In addition there is insufficient basis in the present record for the paragraph 5 finding tha the crime was committed in a cold, calculatd, and pre-meditated manner so as to fall within the purview of section 921.141(5)(i), Florida Statutes (1981). See Mann v. State, 420 So.2d 578 (Fla. 1982); Jent v. State, 408 So.2d 1024 (Fla. 1981), cert. denied, 457 U.S. 111 (1982).

Reversed and remanded to the circuit court for a new trial in accordance with this opinion.

It is so ordered.

ALDERMAN, C.J., BOYD, OVERTON, McDONALD, EHRLICH and SHAW, JJ., Concur
ADKINS, J., Dissents

NOT FINAL UNTIL TIME EXPIRES TO FILE RE-HEARING MOTION AND, IF FILED, DETERMINED.

An Appeal from the Circuit Court in and
for Pinellas County,

Jerry R. Parker, Judge

Case No. CRC78-875CFANO

Jerry Hill, Public Defender and W.C.
McLain, Assistant Public Defender, Chief,
Capital Appeals, Tenth Judicial Circuit,
Bartow, Florida,

for Appellant

Jim Smith, Attorney General and William E.
Taylor, Assistant Attorney General, Tampa,
Florida,

for Appellee

SUPREME COURT OF FLORIDA

Wednesday, January 11, 1984

RAYMOND LEE DRAKE,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. 62,185
Circuit Court No.
CRC78-875CFANO
(Pinellas)

Upon consideration of the Motion for Rehearing filed in the above cause by attorney for appellee, and response thereto,

IT IS ORDERED that said Motion be and the same is hereby denied.

ALDERMAN, C.J., BOYD, OVERTON, McDONALD, EHRLICH and SHAW, JJ., concur ADKINS, J., dissents

A True Copy

TEST:

Sid J. White
Clerk, Supreme Court

By: Tanya Carroll
Deputy Clerk

TC

cc: Hon. Karleen
F. DeBlaker,
Clerk
Hon. Jerry R.
Parker, Judge

W.C. McLain,
Esquire
William E.
Taylor, Esq.

DIRECT EXAMINATION

BY MR. HART:

Q. Please state your name and occupation.

A. Manuel Pandokos, Special Agent, Florida Department of Law Enforcement.

Q. Back in 1977, how were you employed?

A. Detective assigned to Homicide, Pinellas County Sheriff's Office.

Q. Did you have occasion to become involved in the investigation of a homicide of one Odette K. Reader?

A. Yes, I did.

Q. And what was the nature of your responsibility in that investigation?

A. To conduct and coordinate the investigation.

Q. Now, ultimately you came in contact with Raymond L. Drake, did you not?

A. Yes, I did.

Q. Do you see him here today?

A. Yes, I do.

Q. Will you stipulate to I.D.?

MS. SCHAEFFER: I do.

Q. (By Mr. Hart) With regard to that, could you tell the Court how you came into contact with Mr. Drake?

A. Yes. From the beginning?

Q. Yes, the circumstances that led you to contact Mr. Drake about this investigation.

A. Mr. Drake had been identified through photopack identification by numerous witnesses that had see him at a lounge in Clearwater. As a result of that identification, I proceeded to Mr. Drake's place of employment which at that time was the Isla del Sol. It was a project under construction in St. Petersburg.

Q. So the Court will understand, this lounge was the lounge she was identified as having left with the Defendant the last time she was seen alive?

A. That's correct. It's the Crown Lounge on Missouri Avenue in Clearwater.

Q. Okay. And where did you find the Defendant?

A. The Defendant was on the construction project at Isla del Sol working there.

Q. Were you in uniform at the time?

A. No, I wasn't.

Q. Working plainclothes?

A. Yes, myself and Detective -- Sergeant -- and Frank Coleman went to that complex both in plainclothes and plain car.

Q. What did you find Ray Drake doing at that time?

A. I don't know what he was doing. I believe his superintendent told him to meet us back at the construction trailer, if I can remember that far back. Anyway, Raymond Drake came to that location.

Q. You identified yourself as police officers at that point?

A. Yes.

Q. And what did you tell him?

A. I told him we were conducting an investigation, would like him to come with us to answer some questions.

Q. Did you ask him whether or not he would come with you?

A. He agreed to come with us based on what I just said.

Q. And did you threaten him in any fashion to get him to accompany you?

A. No, it was a mere request for him to accompany us.

Q. Was it anything more than just related?

A. No, it wasn't.

Q. How long did it take him to agree for him to accompany you to get to the Sheriff's office?

A. Not long at all. We got in my car, went back and got to the Sheriff's office.

Q. You were there a minute or two or three before he agreed to go back with you?

A. It could have been a minute or two. Specifically how long I don't remember.

Q. Now, at this point had you arrested him?

A. No.

Q. And had you told him he was under arrest?

A. No.

Q. Had you threatened him if he did not accompany you?

A. No, he was not threatened or coerced in any way.

Q. What was his demeanor in responding to your request that he accompany you to the station?

A. He seemed to be calm.

Q. Okay.

A. He agreed to come with us. That's about all I can say about that.

Q. And what happened when you arrived at the station?

A. When we got back to the station we went to the Crimes Against Persons office which is my office, and Sergeant Coleman was in there also. It was at that time that I advised Ray of his rights under the Miranda Warning and we went from

there. I also - I'm sorry, after I advised him of his rights I told him we were conducting a homicide investigation and that he was a suspect in the case.

Q. Okay. did he say anything in repsonse to that?

A. No, we just started beginning the questioning about talking or asking what lounges he frequented in the area.

MR. HART: Will you stipulate to the contents of the card?

MS. SCHAEFER: Yes.

Q. (By Mr. Hart) He indicated his understanding of his Miranda rights?

A. Yes.

Q. And did he indicate a willingness to talk with you?

A. Yes.

Q. Had you threatened him in any fashion or promised him anything to try to

get him to make a statement to you at that point?

A. No, no threats, no promises.

Q. What was his demeanor at that time?

A. Same, calm.

Q. Was there anybody else present besides yourself and Detective Sergeant Coleman?

A. No.

Q. How long had you been at the stations before he had begun talking with you about the events of that evening?

A. As soon as we got into the office he was given his rights and we began questioning.

Q. Okay.

A. And right after the rights and being advised of the investigation, he being advised he was a suspect, we started

to question him.

Q. And what did he relate to you at that point?

A. I first opened by asking what lounges he frequented, specifically had he ever been to the lounge on Missouri Avenue that was the Crown Lounge. He said, no he hadn't. He was confronted with the problem that he was seen there by several witnesses and then he said he might have been there on one occasion. He went on to follow that up with saying that he had been to the Pinellas Park Leisure Lounge which is the counterpart of the Crown Lounge up here in some way and he previously had met a barmaid and apparently there was an arrangement of some kind for the Defendant to meet the barmaid at the Crown Lounge up on Missouri so they could go out for a date and it was, that was part of the

question, and, the, he was shown a picture of Odette Reader and asked if he had ever seen this lady before and he said no, he hadn't. Then he was confronted with the same possibility that witnesses had seen him leave that bar, the very same Crown Lounge on Missouri Avenue that evening. Then he said something to the effect, "I might have seen her once, I might have been out with her. I go out with a lot of girls."

Q. Something to the effect, "I leave lots of lounges with lots of girls"?

A. Yes.

Q. Did he make any further statements with reference to actually having left with Odette Reader that night?

A. Yes, he did. He left the lounge with Odette Reader. He said he left the lounge with Odette Reader for the purpose

of smoking marijuana. They drove around the block, came back to the parking lot. The Defendant said he leeft her off and said that was the last he saw her, in the parking lot.

Q. Was this after he, you had told him that he had been positively identified as the person who did, in fact, leave with Odette Reader?

A. Yes, it was.

Q. What happened at this juncture in the conversation?

Q. Mr. Drake requested his attorney, presence of his attorney.

Q. Could you describe to the Court in what fashion he made this request?

A. I don't know if he said, "I want to talk to my attorney now, I want to see an attorney." All I remember was that he requested in some way an attorney, he

wanted to talk to his attorney.

Q. Did you cease your interrogation at that point?

A. Yes, we did.

Q. Did you continue to talk to him about other matters or unrelated matters?

A. No, after he requested his attorney I asked him who represented him and he said Martin Murry. I went to the telephone and called his office and Mr. Murry's secretary answered and said that he wasn't in. I told the secretary that Mr. Drake is being considered a suspect in a homicide investigation, that he is requesting Mr. Murry's representation and she said she would give him the message and call back.

Q. Okay. Was this conversation, or at least your part of the conversation on the phone with Mr. Murry's secretary, in the Defendant's presence?

A. Yes, he was in the room. He was in the same office.

Q. Did you relay to him the results of that conversatin that Mr. Murry was not available at that time? Or was he just aware of it from the nature of the conversation?

A. I'm going to say I don't recall. If I told him, or if he was there he could have heard it. It's a very small office, not that large.

Q. Were you any further away from his than you are now?

A. Probably as close as we are right here.

Q. And what happened at that juncture?

A. We went back to question Mr. Drake again and weren't having much luck as far as him answering any questions, so,

we asked if he would at least cover with us what he had already discussed and tape record it and he agreed to do so, and, therefore, we taped the other statement.

Q. What other efforts did you make to contact eh lawyer before doing that?

A. We made a total of four calls that day.

Q. If you would, take us through one at a time, give the Judge the sequence of events and terms of the calls.

A. I can't do that. I can't remember.

Q. Well, prior to taking the taped statement from him, how many calls did you make to attorneys?

A. There would have been two additional calls which would have brought the total to three. Then there was another call made to another attorney. I think

Mr. Drake recommended Mr. Lauderback (phonetic), Lauderback, and I tried to call his office.

Q. Were all these calls conducted in a similar fashion where you were sitting basically within a few feet of him and trying to get an attorney and relating to him you couldn't find one?

MS. SCHAEFFER: I object to that, Judge, I don't think Detective Pandokos ever related that. I think he said he didn't know what he overheard.

THE COURT: Objection sustained.

Q. (By Mr. Hart) What part of the conversation did you have in the Defendant's presence with these three, or during these three other phone calls?

A. I don't know if Mr. Drake was present when I called Mr. Lauderback. I just don't remember. All I know is that

whatever time I used the phone I used it in the same office and whatever Mr. Drake would have overheard he overheard.

Q. Was he in the office during all these phone calls?

A. Yes, he was, to the best of my knowledge.

Q. And do you have an actual recollection of him being present during two of the phone calls?

A. Yes.

Q. To Marty Murry?

A. Yes.

Q. The two besides the first one?

A. Right, but I just don't remember when, the way you are asking, as far as sequence at what point and when.

Q. Both -- is it accurate to say that those four attempts made by you occurred between the first time he mentioned

an attorney and the time you obtained the taped statement?

A. No, sir, I believe the last attempt to Mr. Lauderback was after we got back to the office after leaving Mr. Drake's house.

Q. Okay. So, how many attempts were made prior to obtaining the taped statement?

A. Three.

Q. All to Mr. Murry?

A. Mr. Murry, right.

Q. Now, at this particular point in time, had you told the Defendant that he was not free to go?

A. No.

Q. Had you told him he was under arrest?

A. No.

Q. Had you threatened him or

coerced him in any fashion?

A. No.

Q. Offered him any hope of reward for talking with you?

A. No. I just let him know that he was suspect in the case.

Q. Was there any yelling or screaming?

A. No.

Q. At that point?

A. No, there was never any yelling and screaming.

Q. Was he, in fact, free to leave at that point?

A. Had he gotten up to leave he could have probably done so. I wasn't prepared to arrest him at that particular point in time for the murder of Odette Reader.

Q. In fact, you did not arrest him

at all that day, did you?

A. Not for the murder of Odette Reader.

Q. I understand. So, at that particular juncture when you asked him if he would be willing to make a taped statement, he was free to get up and leave?

A. Correct.

Q. And did he thereafter cause this tape to be made?

A. Yes.

Q. What did you say to him prior to this taped statement being made?

A. Prior to the taped statement being made?

Q. Right.

A. I mentioned earlier we would like to get what he had already told us on tape as far as his activities for that evening. I believe it was November the

25th.

Q. And what did he say to you with regard to obtaining that information?

A. He said okay. So, we went ahead and taped it. I don't know if he is specific words were okay, but he didn't object to it, so, we went ahead and recorded his statement.

Q. Okay. And did you readvise him or remind him of his rights?

A. Yes, I did, as soon as we turned the tape on I advised him that he was still under Miranda, reminded him of his rights, didn't specifically go over them again, just reminded him of them.

Q. How long a time are we talking about from the time you first arrived at the station until the time you began that taped conversation, approximately?

A. I would have to guess

approximately an hour, maybe 45 minutes.

Q. How long did you wait for the attorney, Marty Murry, to return the call?

A. Again, that's a guess, maybe a half an hour.

Q. Okay.

A. Or more.

Q. All right. And during this time there were no further interrogations with reference to the disappearance of Odette Reader?

A. No. In fact, we tried to speak to him but he wasn't going to make any statements pertaining to that, so, that's when we went back to if you are not going to tell us anything further would you go back and tell us what you did. That's what we did.

Q. During this conversation did you make any mention with regard to what you

found at the crime scene?

A. Made some mention to him, the possibility of a person committing a crime always leaves something at a crime scene.

Q. What did you tell him?

A. Exactly what I said, there is hardly ever a crime committed that the person who commits the crime doesn't leave something there, I want him to try and think about what it was.

Q. What was his response?

A. He began thinking about it.

Q. What did he say?

A. First he interrupted his thinking by saying I believe it's, I couldn't have left anything there, I wasn't there and then there was also another statement, I don't remember anything there. The tape is there. I don't remember verbatim what he said.

Q. You have the original tape?

A. Yes, I do.

Q. Thereafter, what did you say to him?

A. Well, the interview concluded by Mr. Drake. He said he would be glad to help us in any way he could. I told him I appreciated his help, that he was a suspect or witness, whatever. We asked him if we could search his house and we went through the necessary paperwork on the house and his right to refuse whatever, and that was more or less the conclusion of the tape.

Q. Okay. And he indicated to you that he was willing to cooperate in any fashion at that point?

A. That's right, yes.

Q. What did he thereafter do?

A. He took us to his house and let

us search through his house and we went through his car.

Q. Okay. And did you ever arrest him that day for Odette Reader's murder?

A. No.

Q. Did you ever tell him that he was not free to go?

A. No, not during the interview. Later, after we searched the house he was not free to go because his parole officer had placed a ten day hold on him for violating his parole. At that point he was not free to go.

Q. When did you learn that?

A. That was after we were at the house, after the search.

Q. After you completed the search of his house?

A. Yes.

Q. And did you relate that the

information to the Defendant as soon as you received it?

A. I don't know if it was as soon as I received it, but it was related to him because he was transported to the County Jail and, by Detective Newman and Daniels.

Q. Are you the person who took him into custody for that parole violation?

A. No, Detective Newman took him into custody, transported him.

Q. Who advised him?

A. I don't recall specifically.

Q. But you do recall that did not occur until the search was complete of the house, home and vehicle?

A. That's correct.

Q. And was he ever cuffed?

A. No.

Q. Prior to the questioning during

questioning or during anything, any of the search?

A. He was not under arrest, no. If he would have been told he was under arrest or whatever, he wasn't cuffed in any way.

Q. And you were back at his home with him after this taped statement was made?

A. Right.

MR. HART: If I could have a moment. I don't have anything else.

CROSS EXAMINATION

BY MS. SCHAEFFER:

Q. He was arrested that day, was he not?

A. Yes, he was.

Q. His parole officer wasn't there, was or she?

A. At the Sheriff's office?

Q. Right.

A. Yes, he was.

Q. He was there listening to this interrogation?

A. No, he wasn't.

Q. How was he made aware of any violations?

A. I told him.

Q. When did you tell him?

A. During that day.

Q. You wanted to keep him there anyway you could?

A. The probation officer or the Defendant?

Q. The Defendant.

A. I wanted to interview the Defendant.

Q. You wanted to keep him there any way you could, isn't that true?

A. Specifically --

Q. Specifically you wanted to keep

him there, that's why you went to the parole officer? He admitted to smoking marijuana, isn't that true?

A. Since it was his parole officer I wanted him to know his client was close to a homicide investigation.

Q. So you could keep him there?

MR. HART: I would object to that. I don't think it's relevant. The test is whether or not under the circumstances the Defendant would have believed that he was in custody and a cite for that is Williams v. State, 403 So.2d 453, and what the officer had in his mind is irrelevant unless it is manifested by some objective thing that he said or did that would cause the Defendant to believe that he was not free to go.

MS. SCHAEFFER: It seems to me that is more the nature of an argument.

I'm simply asking some questions.

THE COURT: Objection overruled.

Q. (By Ms. Schaeffer) Is it not, in fact true that you talked to the parole officer and told the parole officer that he had admitted to smoking marijuana because you wanted to keep him there because he was a suspect in your homicide, isn't that true?

A. It's true that I told the parole officer that he had admitted to smoking marijuana. I did not want to use that as a tool to keep him there. I can't answer it any other way.

Q. Okay. How did the parole officer get there?

A. I don't know, maybe came by car. I don't know if we brought him or not.

Q. You advised him, did you not, of a situation that had him there?

A. I advised him of the situation.
How he got there I don't know.

Q. You didn't advise him you wanted him for parole violation? You advised him you thought he was a real live one in your homicide investigation, isn't that true?

A. I don't think I used the words live one.

Q. I'm sure you didn't but words to that effect, right?

A. Right.

Q. Was there any question in your mind when you requested Ray to come in you were investigating him as a suspect in a homicide?

A. There is no doubt in my mind that I did tell him that.

Q. So, when you were questioning him you had him there and you advised him that you were questioning him not about a

homicide in Oldsmar?

A. That's correct.

Q. And when he told you he wanted to see an attorney, is that any doubt that he, you had been talking to him about the homicide in Oldsmar?

A. There should be no doubt in his mind about that.

Q. When he said he wanted an attorney, in your mind at least, you thought he was talking about the homicide, is that correct?

A. That's true.

Q. Is it not, in fact, true that at that point in time both you and Detective Coleman continued to question him whereupon he sat silent and didn't answer your questions at all?

A. That's correct.

Q. You continued to question him,

didn't you?

A. That's correct.

Q. He never initiated any conversation with you suggesting to you that he wanted to talk with you again?

A. That's correct.

Q. And then your statement to him after he remained silent and after you-all continued questioning him is would he not tell you what he had already told you on tape?

A. On tape, that's correct.

Q. And these statements about what he might have left at the scene was nothing you talked about with him before had you?

A. That's correct.

Q. In fact, so that the record is perfectly clear, when Detective Coleman continued to question him he just sat

there, did he not?

A. Yes, that's right.

Q. Okay. And I believe in your prior deposition you talked about it being a one-sided conversation?

A. Is that my deposition?

Q. Right.

A. That that's true.

Q. And he didn't say anything except sit there and listen to you-all?

A. Okay.

Q. And it was only after you asked him if he would give you a taped statement of what he had already told you that he agreed to say anything else at all?

A. He agreed to say anything else at all?

A. He agreed to go ahead and give us the taped statement.

Q. After you said, okay, all we

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want to talk about is all we have gotten from you, put that on tape, right?

A. That's correct.